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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

SAEED FAZELI, Plaintiff and Appellant, v. JOHN ALDEN WILLIAMSON II et al., Defendants and Respondents.	H036951 (Santa Clara County Super. Ct. No. 1-07-CV083156)

Appellant Saeed Fazeli was a victim of a Ponzi scheme perpetuated by Michael Schneider. Schneider used the corporate entity California Plan, Inc. (Cal Plan) to defraud investors who financed residential loans.[1] Fazeli[2] brought an action for damages and injunctive and declaratory relief against, among others, respondents John Williamson, Thomas Challman, Fidelity National Title Company (Fidelity), and Chicago Title Company (Chicago).[3] After the trial court sustained respondents' demurrers to Fazeli's

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[1] Neither Schneider nor Cal Plan was named as a defendant in this action due to bankruptcy proceedings in which they are bankruptcy debtors.

[2] Fazeli brought this action individually and as trustee for the Fazeli Irrevocable Trust dated October 1979 and the Fazeli Irrevocable Trust dated September 2003.

[3] Fazeli has informed this court that respondent Paul Letsinger is no longer a party to this appeal due to the terms of a settlement. He has also informed this court that (continued)

sixth amended complaint (SAC) without leave to amend, Fazeli filed a timely appeal.[4] We conclude that the trial court erred when it sustained the demurrers of Williamson and Challman and that it properly sustained the demurrers of Fidelity and Chicago.

I. Procedural Background

In April 2007, Fazeli filed his initial complaint. Multiple initially-named defendants were either omitted from later amended complaints or dismissed. Defendants filed answers or demurrers, or both, to various amendments of the complaint. In June 2010, Fazeli filed the SAC.

Following a hearing in March 2011, the trial court sustained respondents' demurrers to the SAC without leave to amend. The trial court sustained the demurrers of Williamson and Challman to the eleventh (professional negligence) and twelfth (negligence) causes of action after concluding that Fazeli failed "to allege sufficient facts to establish that Challman and Williamson owed and breached duties of care to Plaintiff, or that they were actually aware of the Ponzi scheme." The trial court found that Fazeli failed "to sufficiently allege any wrongful conduct on the part of Challman and Williamson, or their knowledge of the Ponzi scheme, let alone substantial assistance and

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Williamson is now deceased and the "'Trust of John A. Williamson, II' may now be the real party in interest." We will refer to this respondent as Williamson.

[4] Though the record contains a judgment of dismissal in favor of Williamson and Challman and thus is appealable under Code of Civil Procedure section 904.1, there is no judgment of dismissal in favor of Chicago and Fidelity. "The general rule of appealability is this: 'An order sustaining a demurrer without leave to amend is not appealable, and an appeal is proper only after entry of a dismissal on such an order.' [Citation.] But 'when the trial court has sustained a demurrer to all of the complaint's causes of action, appellate courts may deem the order to incorporate a judgment of dismissal, since all that is left to make the order appealable is the formality of the entry of a dismissal order or judgment.'" (*Melton v. Boustred* (2010) 183 Cal.App.4th 521, 528, fn. 1.) Thus, we will treat the order sustaining the demurrers of Chicago and Fidelity as appealable.

encouragement thereto" and sustained the demurrers to the fourteenth cause of action (aiding and abetting the commission of breaches of fiduciary duty and fraud). It also sustained their demurrers to the fifteenth cause of action (elder abuse) based on Fazeli's failure "to sufficiently allege any wrongful conduct." The trial court sustained the demurrers of Fidelity and Chicago to the sixth (breach of duty based on common law, tort, statute and contract), seventh (negligence), eighth (aiding and abetting commission of a Ponzi scheme), ninth (conversion), and tenth (elder abuse) causes of action. The trial court found: "Plaintiff once again fails to sufficiently allege that the escrow company defendants owed any duty to Plaintiff in connection with the escrows in question, or failed to comply with escrow instructions from the parties to the escrows. Plaintiff's attempt to allege an oral contract is insufficiently pled, and any such claim is untimely. Plaintiff fails to sufficiently allege third party beneficiary status because he fails to allege facts to support that the escrow contracts were made expressly for his benefit. Plaintiff fails to allege facts to support his conclusory allegations that the escrow company defendants knew about the Ponzi scheme and gave substantial assistance and encouragement thereto. Plaintiff fails to allege that the escrow company defendants converted his money by a wrongful act."

II. Standard of Review

"'A demurrer tests the sufficiency of the complaint as a matter of law; as such, it raises only a question of law. [Citations.]' (*Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316.) Thus, the standard of review on appeal is de novo. [Citation.] 'In reviewing the sufficiency of a complaint against a general demurrer, we are guided by long-settled rules. "We treat the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. [Citation.] We also consider matters which may be judicially noticed." [Citation.] Further, we give the complaint a reasonable interpretation, reading it as a whole and its parts in their context.

[Citation.] When a demurrer is sustained, we determine whether the complaint states facts sufficient to constitute a cause of action. [Citation.]' [Citations] Where, as here, a demurrer is to an amended complaint, we may consider the factual allegations of prior complaints, which a plaintiff may not discard or avoid by making '"'contradictory averments, in a superseding, amended pleading.'"' [Citation.]" (*Berg & Berg Enterprises, LLC v. Boyle* (2009) 178 Cal.App.4th 1020, 1034 (*Berg*).) "We will affirm if there is any ground on which the demurrer can properly be sustained, whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings. [Citations.]" (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031 (*Martin*).) Moreover, "'[s]pecific factual allegations modify and limit inconsistent general statements.' [Citation.]" (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1371.)

III. The SAC

A. Background Allegations

In 1993, Schneider became the owner of Cal Plan. Both Schneider and Cal Plan were licensed real estate brokers. Cal Plan arranged loans between private investors and borrowers. The borrowers were often unable to obtain credit from institutional lenders due to an adverse credit rating or the nature of the property securing the loan. Schneider and Cal Plan attracted investors by offering interest rates of 10 percent or more on their money. Cal Plan acted as the loan servicing agent for the investors of the real estate loans made through Schneider or the employees of Cal Plan. Investors were told that Schneider "would invest their money in mortgage loans secured by real property in exchange for collecting fees as the loan servicer." Cal Plan, including employees Williamson and Challman, told investors that they would receive a promissory note secured by a deed of trust against real property in exchange for their investments, the

loans would be issued to legitimate qualified borrowers, and these borrowers had sufficient equity in the real property to protect the investors' interests. They were also told that they would receive interest payments from the borrowers until the principal was paid in full at which time their investment would be returned. Most of the investors were senior citizens, including Fazeli.

However, Schneider and Cal Plan "used a complicated array of fraudulent loans, non-existent loans, non-existent deeds of trust, fraudulent deeds of trust, and non-existent security to fuel their 'Ponzi' or pyramid scheme which offered oftentimes no real investment value to its victims." In one method of fraud, an investor made a loan to a borrower, who signed a promissory note and a deed of trust securing the loan by residential property that the borrower owned. The borrower then made interest payments until the property was sold or refinanced. Cal Plan recorded the deed of trust in favor of the investor against the property securing the loan. When the property was sold or refinanced, however, the escrow company paid Cal Plan and Schneider rather than the investor. Cal Plan continued to send interest payments to the investor as if the loan was still active and thus prevented investors from discovering the fraud. The source of these "interest payments" was the capital raised when Cal Plan sold investment loans to more recent investors. In a second method of defrauding investors, a legitimate borrower did not exist. Schneider gave investors phony documents to convince them that they had a secured interest recorded against real property. These investors were paid from prior payoffs by the escrow companies to Cal Plan and from the capital raised by Schneider and Cal Plan. In a third method, investors loaned money to non-existent borrowers and Schneider and Cal Plan persuaded the investors to allow them to retain the phony promissory note and deed of trust. Due to changes in the real estate market and economy, Schneider and Cal Plan were unable to attract investors "to the bottom of the pyramid." When investors stopped receiving their payments, the scheme unraveled and Schneider eventually pleaded guilty to financial fraud charges.

In 1992, Fazeli made his first loan. In 1993, money due to Fazeli was paid by an escrow company directly to Cal Plan.

B. Allegations Against Williamson and Challman

The eleventh cause of action for professional negligence incorporates by reference the previous allegations and alleges that Williamson, the broker of record for Cal Plan, and Challman, Schneider's close personal friend and a licensed real estate salesperson employed by Cal Plan, owed fiduciary duties to Fazeli.[5] It also alleges that Williamson and Challman owed these duties to Fazeli because they acted as loan officers for loans in which Cal Plan represented both the borrower and Fazeli.

As to Williamson, the following facts are alleged. Williamson was the owner of Cal Plan until the end of 1992. Williamson did not disclose to investors the "serious financial problems" with Cal Plan. After Williamson sold Cal Plan to Schneider in 1993, he held a security interest in the stock of Cal Plan through the end of 1999. In connection with the sale of the corporation, Williamson sent Schneider's "Corporation License Application" to the Department of Real Estate. The form identified Schneider's history of theft, and thus Williamson was aware he was transferring fiduciary control over Fazeli's money to an individual who had previously been involved in theft.

Williamson was the broker of record for Cal Plan through November 14, 1996. Williamson "assisted Schneider in the initial wrongful transactions while he was still the broker for [Cal Plan]. . . . Williamson started and trained Schneider in the payment of interest on fictitious loans. [Cal Plan] at the directions of Williamson continued to pay

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[5] Though the SAC characterizes Challman as a real estate agent, the Department of Real Estate does not issue licenses to agents; it issues a broker's and a salesperson's license. (Bus. & Prof. Code, §§ 10014, 10130.) A broker may solicit borrowers and lenders for loans secured by real property. (Bus. & Prof. Code, § 10131.) A real estate salesperson "is employed by a licensed real estate broker to do one or more of the [tasks a broker is authorized to do]." (Bus. & Prof. Code, § 10132.)

investors on the Welms, Wirtz and Lea loans with monthly loan interest payments. This included [payments] for the Wirtz property after the property had gone through a trustee sale. This is the essence of what later became the larger Schneider Ponzi scheme. Williamson was thus aware of the commencement of the Ponzi scheme in the company he was then broker of record for." Williamson was the broker of record for Cal Plan when Fazeli became a "lender on loans that failed including because of wrongful payoffs, when loans in which . . . Fazeli was a lender were paid off by payments to [Cal Plan] and not . . . Fazeli, and when . . . Fazeli loaned money that he thought was the subject of a valid promissory note and accompanying deed of trust but was only a sham transaction in a Ponzi scheme."

Three loans were created and the fraudulent conveyance by Schneider and Cal Plan resulting in damages to Fazeli occurred while Williamson was still broker of record for Cal Plan. In September 1995, Fazeli lent Smith $75,000 by a note secured by a deed of trust against real property located on Craig Road in Hillsborough. Exchange Security Corporation[6] was the trustee and Fazeli was the beneficiary. In April 1996, when Smith transferred title to Walter and Richard Li, the escrow company erroneously recited that the obligations were satisfied in full to Fazeli. In April 1994, Fazeli lent Edward and Nancy Latin $236,000 by a note secured by a deed of trust against real property located on Fair Oaks in Carmichael. Exchange Security was the trustee and Fazeli was the beneficiary. In October 1994, the Latins transferred title to Carmichael Recreation and Park District. At that time, the escrow company obtained from Exchange Security on

[6] The SAC alleges that Exchange Security Corporation (Exchange Security) "acted as an escrow company responsible for many of the transactions involving real properties for which those defendants identified in paragraphs 28 through 36 and 42 were not the escrow companies." Challman, Williamson, Susan Dyer, Rose Ann Buettler, Schneider, Does 5 through 100 are identified in paragraphs 28 through 34. Paragraphs 35 and 36 set forth background facts. Paragraph 42 sets forth the Ponzi scheme and refers to escrow companies, including Fidelity and Chicago.

behalf of Schneider a deed of full reconveyance for the Fazeli deed of trust. Fazeli alleges that this document contains forgeries. In January 1996, Fazeli loaned Neta Keller $170,000 by a note secured by a deed of trust against real property on Cloud Avenue in Menlo Park. Exchange Security was the trustee and Fazeli was the beneficiary. In August 1996, Keller conveyed her interest in the property to Pen 3 Development Trust and Donald Junkin III Trust, which then conveyed its interests to Bernard Black and Brenda Hoy in March 1998. In August 2002, Hoy conveyed her interest to Black. Black later conveyed his interest to Steven and Allison Spinner. No deed of full reconveyance from or on behalf of Fazeli was ever filed or authorized by him.[7]

Williamson continued as an employee of Cal Plan until it closed in March 2006. During this time, he supervised others, including Challman and Letsinger. Williamson and Schneider were also listed as joint account executives on at least one loan after Schneider took over Cal Plan. Williamson knew or should have known of the Ponzi scheme because he had access to Cal Plan's financial records. Williamson told Fazeli on

[7] In the following transactions, the fraudulent reconveyance by Schneider and Cal Plan occurred when Williamson was no longer broker of record for Cal Plan. In September 1995, Fazeli lent Virginia Smith $110,000 by a note secured by a deed of trust against real property located on El Camino Road in San Bruno and on Laurel Avenue in San Mateo. Exchange Security was the trustee and Fazeli was the beneficiary. In January 1996, Fazeli lent Smith an additional $75,000 by a note secured by a deed of trust against the same real property. In 1998, an escrow company issued checks totaling over $185,000 to Cal Plan rather than Fazeli. In June 1994, Fazeli lent Edward and Deborah Strobin $175,000 secured by a deed of trust against real property located on Baywood Avenue in Hillsborough. Exchange Security was the trustee and Fazeli was the beneficiary. In 2000, title was transferred to Jeffrey and Leigh Glasson, and Fazeli was not informed of the transfer. In June 1995, Fazeli lent Patricia Graham and Roland LaForest $150,000 by a note secured by a deed of trust against real property on Collier Canyon Road in Livermore. In March 1998, when Graham and LaForest transferred title for the property to Lawrence and Rachelle Gosselin, no deed of full reconveyance from or on behalf of Fazeli was ever filed or authorized by him.

several occasions, including as late as 2004, that Fazeli "was in good hands" with Schneider.

Williamson "continued to work after [he was] aware that borrowers had not been paying on fake loans. This includes that [he] continued to work in and after February of 2006 for [Cal Plan], and receive monetary compensation for doing so, to the direct detriment of lenders including specifically Saeed Fazeli. Loans by Saeed Fazeli to be secured by real property commencing in 1993 – when each of the named defendant individual employees worked and defendant Williamson was the broker of record – with a loan in the amount of $150,000 to be secured by the real property located at 20300 Bear Creek Road, Los Gatos, California 95030 continued through February of 2006 by a loan of $230,000 to be secured by the real property located at 3711 Alameda de las Pulgas, Menlo Park, California. This February 2006 loan loss of $230,000 alone would not have been lost by Saeed Fazeli if . . . Williamson . . . had not continued to process this loan."

As to Challman, the eleventh cause of action alleges the following facts. Challman assisted Schneider by soliciting borrowers and sold loans to investors. Challman received checks from investors, including Fazeli, and gave them to Schneider. He prepared, signed, and sent payoff demands for payments to be made to Cal Plan rather than to investors. Challman received money from borrowers, including from Miguel Vargas for a loan from Fazeli, and "directed the attribution" of these payments. He had "direct daily knowledge of and participation in receiving money from borrowers and escrow companies that should have been given to investors such as Saeed Fazeli but which were instead kept by [Cal Plan]. . . . Challman had signatory authority on bank accounts," including the bank account used for the Ponzi scheme. Challman assisted Schneider in determining which loans were to be included in Cal Plan's accounting software program. In April 2005, Challman sent an e-mail to Schneider stating that he "knew some loans were not in accounting" and he would "leave it up to [him] as to

whether [he] want[ed] to run it through the mortgage office or not." Challman also acted as a manager when Schneider was not in the office.

Challman "assisted Schneider in hiding the pay offs of loans from investors." He brought "monthly checks to . . . Fazeli's house . . . with notations of payments for interest on loans that had already been paid off by the borrowers and for which no interest could actually still be due." Challman told Fazeli, "We will do a good job. I am doing a good job."

Challman was the loan officer for several loans from Fazeli that "were fake in whole or in part." They included the following loans. Challman gave Fazeli documentation on the Cheng loan which listed interest at 12 percent. However, the interest rate on the documentation given to Cheng listed the interest rate at 10 percent. When the Cheng loan was sold to Mel Nashban in 2001, Challman changed the insurance to Nashban. Challman knew that both Fazeli and Nashban "inconsistently 'held' " the Cheng loan. The "paper work" for the Khasshogi property on Washington Street in San Francisco was not filed as a recorded secured interest. Challman personally collected money from the Vargas trust and directed the loan payoff to Cal Plan and not to Fazeli. Commonwealth Title Company issued an ALTA policy to Schneider for the Bear Creek property and faxed it directly to Challman and thus he knew that Fazeli's interest in this property was not a secured interest. In December 2005, Challman was aware that there was never a recorded interest for the loan to Quereshi and that this loan was never entered on "the legitimate loan records of [Cal Plan]."

Williamson and Challman breached their duties of professional conduct by: failing to learn the facts relating to Fazeli, assisting Schneider in the fraudulent scheme, and failing to exercise oversight over the loans or Schneider's operations. Williamson also breached his duty by entrusting Fazeli's transaction to a person whom he knew was not trustworthy and recommending that Fazeli "continue to use a broker whom he knew had engaged in the fraudulent loan transactions of the Ponzi scheme." The actions of

Williamson and Challman caused Fazeli to sustain losses from investments in excess of $6 million.

The twelfth cause of action for negligence incorporates by reference the previous allegations and alleges that Williamson and Challman, as real estate licensees and employees, breached their duties "when they failed to exercise reasonable care in processing, assigning and obtaining payment on loans for which [Fazeli] was the lender and principal," when they did not act as "a trustee in favor of his beneficiary," and when they did not disclose all material facts to Fazeli, and did not exercise reasonable care to prevent the operation of the Ponzi scheme. The actions of Williamson and Challman caused Fazeli to sustain losses from investments in excess of $6 million.

The fourteenth cause of action for aiding and abetting the commission of breaches of fiduciary duty and fraud incorporates by reference the previous allegations and alleges that Williamson and Challman knew of Schneider's conduct, gave substantial assistance to Schneider and their conduct caused Fazeli to sustain losses from investments in excess of $6 million.

The fifteenth cause of action for elder abuse incorporates by reference the previous allegations and alleges that Fazeli was an elder within the meaning of Welfare and Institutions Code section 15600 when the acts, omissions, and breaches of duty by Williamson and Challman occurred on or after August 2000. It also alleges that Williamson and Challman committed financial abuse of an elder person within the meaning of Welfare and Institutions Code section 15610.30 when they "assisted in the taking, secreting or appropriating of personal assets and a secured interest in real property belonging to Fazeli . . . ."

C. Allegations Against Escrow Companies

The sixth cause of action for breach of duty based on common law, tort, statute and contract incorporates by reference the previous allegations and alleges: the escrow

companies had a duty to act for the benefit of Fazeli; they breached this duty by preparing directions for payoff to Schneider without Fazeli's consent and by giving money due to Fazeli to Schneider and Cal Plan; and as a result of the escrow companies' breach of duty, Fazeli lost in excess of $6 million.

As to Fidelity, the sixth cause of action alleges the following facts. Fidelity is licensed as an underwritten title company by the Department of Insurance. Fidelity was also the escrow company for two transactions involving Fazeli. In May 1995, Jensen Gardens became the owner of real property on Fair Oaks Boulevard in Carmichael. In June 1996, Fidelity was the escrow company for an escrow in which Fazeli lent Jensen Gardens $250,000. The loan was secured by a deed of trust on the Fair Oaks property, which was recorded. The deed of trust stated that Exchange Security was the trustee and Fazeli was the lender and beneficiary. It also identified Cal Plan as the "Lender's Servicing Agent." Fazeli assigned portions of his interest in the Fair Oaks deed of trust and the promissory note it secured to Dorothy Bowlin and to Orville and Patricia Henderson under assignment of deeds of trust dated August 6, 1996. Both of these assignments were recorded on August 26, 1996.

In September 1996, pursuant to a beneficiary's demand for payoff that it received from Cal Plan, Old Republic Title Company, not Fidelity, made a payment of $236,541.10 to Cal Plan on behalf of Jensen Gardens. Exchange Security, the trustee, executed a reconveyance of the Fair Oaks deed of trust, which was recorded in December 1997. Old Republic Title was the escrow holder which was responsible for the transactions involving the Fair Oaks property when it disbursed funds to Cal Plan rather than Fazeli.[8]

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[8] However, the third and fourth amended complaints alleged in conclusory terms that First American Title Company disbursed money to Schneider and Cal Plan to pay off the Fair Oak deed of trust. This conclusory allegation was modified in the fifth and the (continued)

In June 2005, JDN, Inc. Profit Sharing Trust (JDN) and several other investors acquired ownership of the Fair Oaks property under a sheriff's deed. In December 2005, they sold the property to Jon Carson and carried back a deed of trust. Fidelity was the escrow holder for this transaction. No deed of full reconveyance on behalf of Fazeli was ever filed or authorized. The deed of trust "should have been declared to remain an encumbrance, right to, or interest" in the Fair Oaks property, "but for the actions of Old Republic Title Company." Carson, JDN, and JDN's co-investors assigned to Fazeli the "title claims" that they might have had against the title companies which issued them title insurance on the Fair Oaks property. However, the SAC did not allege that Carson, JDN or JDN's co-investors obtained a title insurance policy from Fidelity or that Fidelity insured any interest in that property. Nor did the SAC allege that they sustained any loss.

Fidelity was also the escrow company for an escrow in which Fazeli lent Edward and Deborah Strobin $175,000. The loan was secured by a deed of trust on real property on Baywood Avenue in Hillsborough. The deed of trust, which was recorded in June 1994, stated that Exchange Security was the trustee and Fazeli was the lender and beneficiary. Fidelity issued a title insurance policy for Fazeli in connection with this loan. In July 1995, Old Republic Title Company executed and recorded a release of obligation pursuant to Civil Code section 2941.[9] This release had "a practical [e]ffect as to subsequent bona fide purchasers for value to remove the rights" of Fazeli. However, the SAC does not allege that Fidelity ever paid off the deed of trust for the Baywood property or that it made payments due Fazeli to Schneider or Cal Plan in connection with this deed of trust.

SAC without explanation to state that Fidelity disbursed money to Schneider and Cal Plan to make the payment.

[9] Civil Code section 2941 outlines the procedures to be followed when a mortgage has been satisfied.

In October 2000, Jeffrey and Leigh Glasson purchased the Baywood property after obtaining a mortgage from First Republic Bank in the amount of $2.5 million. The title company handling the escrow for this transfer was First American Title Company. The trustee for the deed of trust was Fidelity. Fidelity was also the trustee in a deed of trust when the Glassons refinanced the property. Fazeli's security interest in the Baywood property was impaired by a deed of reconveyance when he was not paid for the loan he made to the Strobins.

As to Chicago, the sixth cause of action alleges the following facts. Chicago is licensed as an underwritten title company by the Department of Insurance. Chicago was the escrow company for two escrows in which Fazeli was the lender and the beneficiary, and Chicago distributed money due to Fazeli to Schneider. In 1999, Louis and Cassie Arriaga became owners of real property on Wainwright Avenue in San Jose. In January 2003, they executed a deed of trust on the property in favor of Rose Tsai. In November 2003, Chicago handled the escrow for a transaction in which Fazeli loaned the Arriagas $150,000. The loan was secured by a deed of trust on the Wainwright Avenue property. The deed of trust stated that Exchange Security was the trustee and Fazeli was the lender and beneficiary. Chicago issued a title insurance policy for Fazeli in connection with this loan. The deed of trust also identified Cal Plan as the "Lender's Servicing Agent." In connection with this escrow, Tsai submitted a payoff demand to Chicago.

In June 2004, L. Christopher Arriaga executed a deed that vested record title to the Wainwright property, which had been acquired as "Louis Arriaga and Cassie Arriaga," to "L. Christopher Arriaga and Cassie Arriaga." In July 2004, without Fazeli's knowledge or authorization, Schneider on behalf of Exchange Security executed a deed of reconveyance of the Wainwright property to the Arriagas. Fazeli then pursued claims against the Arriagas in which he sought to void the deed of reconveyance. The Arriagas assigned to Fazeli any claims they might have "against the escrow company or

companies involved in the July 2004 transactions . . . ." The SAC does not identify the escrow companies involved in the 2004 transactions.[10]

In 1994, Terry Deming became the owner of real property located on Danville Highway in Alamo. In May 1999, Fazeli loaned Deming $125,000 that was secured by a deed of trust on the Danville property. This deed of trust stated that Exchange Security

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[10] Chicago has requested that this court take judicial notice of a $615,000 deed of trust that the Arriagas executed in favor of Washington Mutual Bank and that was recorded concurrently with the deed that the Arriagas executed to themselves on June 29, 2004, through an escrow handled by North American Title Company. Chicago also requested that this court take judicial notice of a deed of full reconveyance in which Exchange Security reconveyed Fazeli's deed of trust on the Wainwright property on July 13, 2004, and subsequently recorded on August 3, 2004. *Fontenot v. Wells Fargo Bank, N.A.* (2011) 198 Cal.App.4th 256 explains that "'"'[j]udicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.'"'" [Citation.] When ruling on a demurrer, '[a] court may take judicial notice of something that cannot reasonably be controverted, even if it negates an express allegation of the pleading.' [Citation.] Accordingly, Evidence Code section 452, subdivisions (c) and (h), respectively, permit a court, in its discretion, to take judicial notice of '[o]fficial acts . . . of any state of the United States' and '[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.'" (*Id.* at p. 264.) Reasoning that recordation and use of a notary public in the execution of real property records ensures their reliability, and their maintenance in the recorder's office enables them to be readily confirmed, *Fontenot* concludes that "a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in a recorded document, and the document's legally operative language, assuming that is no genuine dispute regarding the document's authenticity." (*Id.* at pp. 264-265.) "However, the fact a court may take judicial notice of a recorded deed, or similar document, does not mean it may take judicial notice of factual matters stated therein. [Citation.]" (*Poseidon Development, Inc. v. Woodland Lane Estates, LLC* (2007) 152 Cal.App.4th 1106, 1117.) Here, Chicago is requesting that this court take judicial notice of factual matters in the documents. Unlike the deed of trust, the portion of the documents that identifies the title company is not recorded and notarized. Thus, this court denies Chicago's request for judicial notice that North American Title Company handled the 2004 escrow involving the Wainwright property.

was the trustee, Fazeli was the lender and beneficiary, and Cal Plan was the "Lender's Servicing Agent."

On November 1, 2000, Deming executed a deed of trust naming Golden West Savings Association Service Co. as trustee and World Savings Bank, FSB, as beneficiary to secure a $330,000 obligation. Chicago recorded the deed of trust six days later. On December 21, 2000, Exchange Security executed a reconveyance of the Danville deed of trust to Deming. Five days later, the deed of reconveyance was recorded. Fazeli was not aware of and did not authorize the reconveyance.

In 2002, Deming obtained another loan secured by a deed of trust on the Danville property from World Savings Bank, FSB. Chicago recorded this deed. In January 2004, Deming refinanced the Danville property by obtaining a $399,000 loan from California Financial Group. Chicago was the title company for this transaction.

In April 2004, Deming obtained a loan of $200,000 secured by a deed of trust on the Danville property from Cal State 9 Credit Union (Cal State 9). The deed of trust was reconveyed in 2006. Cal State 9 disclaimed any interest in the Danville property. In January 2006, Deming obtained a loan of $500,000 from CIT Group-Consumer Finance, Inc. (CIT Group).

Both Cal State 9 and CIT Group assigned to Fazeli any claims that they might have as a result of the payoff of the loans on the Danville property to anyone other than Fazeli. The complaint does not allege that Cal State 9 or CIT Group sustained a loss as a result of any loan payoff made to someone other than Fazeli.

The seventh cause of action for negligence incorporates by reference the previous allegations and alleges that the escrow companies breached their duty of care when they paid off and discharged the obligations secured by Fazeli's deeds of trust.

The eighth cause of action for aiding and abetting commission of a Ponzi scheme incorporates by reference the previous allegations and alleges that the escrow companies knew that the loans would not be paid to Fazeli, but to Schneider, because: (1) the

escrow companies knew Schneider made certain representations to Fazeli and those similarly situated; (2) the payoffs were made to Schneider and not to Fazeli; (3) the funds were deposited into Schneider's personal accounts; (4) there was no notice by Schneider to Fazeli and other investors; (5) the investors did not sign off the deeds in order to authorize the filing of the deeds of reconveyance, thus leading to improper filing of releases of obligation; and (6) the escrow companies never received original deeds of trust signed by Fazeli or other investors that would authorize the filing of deeds of reconveyance.

The ninth cause of action for conversion incorporates by reference the previous allegations and alleges: Fazeli had a right to the funds from the proceeds of the promissory notes and deeds of trust; the escrow companies took possession of, or prevented Fazeli from having access to, the money for a significant period of time; disposed of Fazeli's money and security interests; and as a result of the escrow companies' wrongful acts, Fazeli suffered damages.

The tenth cause of action for elder abuse alleges that the escrow companies committed financial abuse of an elder person within the meaning of Welfare and Institutions Code section 15610.30 by "taking, secreting or appropriating of personal assets and a secured interest in real property belonging to plaintiff Fazeli."

IV. Discussion

A. Contentions Regarding Williamson

Fazeli contends that the SAC states causes of action against Williamson for negligence and professional negligence. He contends that the trial court erred in ruling that he had failed to state sufficient facts to establish that Williamson owed and breached duties of care to him.

"The elements of a cause of action for professional negligence are (1) the existence of the duty of the professional to use such skill, prudence, and diligence as

other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional negligence." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

"'[I]n order to prove facts sufficient to support a finding of negligence, a plaintiff must show that [the] defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury.' [Citations.]" (*Hayes v. County of San Diego* (2013) 57 Cal.4th 622, 629 (*Hayes*).)

The first element of both causes of action requires "the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.]" (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 57 (*Quelimane*).) Thus, "'[u]nder general negligence principles . . . a person ordinarily is obligated to exercise due care in his or her own actions so as . . . not to create an unreasonable risk of injury to others . . . . [Citations.] It is well established . . . that one's general duty to exercise due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct . . . of a third person. [Citations.]' [Citation.]" (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1128.) Absent a special relationship to a third party, a person owes no duty to control the conduct of another towards the third party or to warn the third party endangered by such conduct. (*Id.* at p. 1129.) Whether a duty exists is a question of law. (*Quelimane*, at pp. 57-58.)

Fazeli contends that Williamson breached his duty to Fazeli, because he was the broker of record of Cal Plan between 1993 and November 15, 1996.

A corporation must designate an officer, who is qualified to hold a real estate broker's license, in order to operate as a corporate broker. (Bus. & Prof. Code, § 10211.) The designated broker is "responsible for the supervision and control of the activities conducted on behalf of the corporation by its officers and employees" to ensure

compliance with the real estate law. (Bus. & Prof. Code, § 10159.2, subd. (a).) The nature of a designated broker's duty to supervise was at issue in *Sandler v. Sanchez* (2012) 206 Cal.App.4th 1431 (*Sandler*). In *Sandler*, Dresser, a real estate salesperson, president, and sole shareholder of a real estate brokerage corporation, solicited the plaintiffs to loan money to finance improvements to an apartment building. (*Id.* at p. 1435.) However, he failed to disclose, among other things, that the property did not have sufficient equity to provide collateral for the second deed of trust that secured the note. (*Ibid.*) Following foreclosure on the first deed of trust, the plaintiffs' note was unsecured. (*Ibid.*) The plaintiffs then brought an action for breach of fiduciary duty against Sanchez, the designated broker for the corporation, based on his failure to supervise Dresser. (*Ibid.*) There were no allegations that Sanchez participated in or was aware of the transaction. (*Ibid.*) *Sandler* held that the duty to supervise "is owed to the corporation, not to third parties. Accordingly, breach of [section 10159.2, subdivision (a)] is grounds for administrative discipline against the designated officer by the licensing entity and perhaps an action by the corporation for indemnification, but not an action by third parties." (*Sandler*, at p. 1434; see also *In re Grabau* (Bankr. N.D.Cal. 1993) 151 B.R. 227, 232.) However, *Holley v. Crank* (9th Cir. 2004) 400 F.3d 667 found additional circumstances, such as an agency relationship between the broker of record and the employee, to support a vicarious liability finding. (*Id.* at p. 673.)

Fazeli argues that additional circumstances are present in this case, because Williamson was not only the designated broker for Cal Plan but he also directly participated in the Ponzi scheme. "A mortgage loan broker owes a fiduciary duty of the 'highest good faith toward his principal' and 'is "charged with the duty of fullest disclosure of all material facts concerning the transaction that might affect the principal's decision."' [Citation.] The broker owes this duty to the lender-investor as well as to the borrower. [Citation.]" (*Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455 (*Barry*).) Fazeli points out that Williamson "assisted Schneider in the initial wrongful transactions

while he was the broker for [Cal Plan]. . . . Williamson started and trained Schneider in the payment of interest on fictitious loans. [Cal Plan] at the directions of Williamson continued to pay investors on the Welms, Wirtz and Lea loans with monthly loan interest payments. This included [payments] for the Wirtz property after the property had gone through a trustee sale. This is the essence of what later became the larger Schneider Ponzi scheme. Williamson was thus aware of the commencement of the Ponzi scheme in the company he was then broker of record for."

Williamson counters that there is "no explanation . . . in the record of what is meant by [] 'fictitious loans' and no connection of this assertion to a duty of care by Williamson to Fazeli or how this allegation factors into the underlying causes of action." However, the SAC alleges that "[t]o keep the investor from discovering its fraudulent acts, Schneider's company, including Schneider, . . . would send monthly loan payments to the investor as if the loan was still active and valid. These 'interest payments' were made not from the third party borrower, however, but rather from Schneider and [Cal Plan] using fresh capital raised by selling more investment loans to similarly defrauded newcomer investors. When the victim/lender would inquire about the loan, either to Schneider, or to . . . Williamson, they were told that their loan was secure and safe." It also alleges that Williamson entrusted Fazeli's accounts to Schneider when Williamson knew that there were "fake loans already on the books which [were] in the same nature of the Ponzi scheme which . . . Schneider operated." Williamson continued to work at Cal Plan after he was "aware that borrowers had not been paying on fake loans," and that Fazeli would not have lost $230,000 in February 2006 if Williamson, among others, "had not continued to process this loan." Moreover, Fazeli funded three loans, which were fraudulently conveyed by Schneider and Cal Plan while Williamson was the broker of record. Thus, in providing Schneider and Cal Plan with a method of keeping the fraudulent conduct from being discovered by investors, including Fazeli, and reassuring Fazeli as to the safety of his investments, Williamson breached his fiduciary duties to

Fazeli. The breach of these duties resulted in damage to Fazeli. Accordingly, the SAC states sufficient facts to constitute causes of action for professional negligence and negligence.[11]

Fazeli next contends that he also established a cause of action against Williamson for aiding and abetting commission of the Ponzi scheme.

"'"Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (b) gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." [Citation.]' [Citation.]" (*Casey v. U.S. Bank Nat. Assn.* (2005) 127 Cal.App.4th 1138, 1144 (*Casey*).) "California courts have long held that liability for aiding and abetting

[11] Fazeli also argues that Williamson had a duty of care to him and was thus personally liable for Cal Plan's wrongful acts because, as a corporate owner through 1999, he knew or had reason to know of these acts. Williamson was the owner of Cal Plan prior to 1993. Though Williamson held a security interest until 1999 in the Cal Plan stock which was sold to Schneider, Fazeli has failed to provide any case or statutory authority for the propositions that a security interest constitutes a "conditional ownership interest" or that it established Williamson as the "majority owner of the corporation until Schneider paid off the debt." Accordingly, we reject this argument. Fazeli next argues that Williamson owed him a duty because "Cal Plan represented both borrower and lender." He claims that "[t]he disclosures and consents necessary to make a dual agency lawful are so comprehensive and specific that a typical real estate broker cannot undertake them as a matter of routine." However, "'"[w]hen an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived."' [Citation.] 'We are not bound to develop appellants' argument for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as waived.'" (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 (*Cahill*).) Since Fazeli has failed to support this claim with reasoned argument or citations to authority, he has forfeited the issue.

depends on proof the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Id.* at p. 1145.)

Here, the SAC satisfies the second prong for imposing liability. As previously stated, the SAC alleges that Williamson gave substantial assistance to Schneider by providing a method of preventing investors from discovering the fraudulent conduct and Williamson's own conduct constituted a breach of duty to Fazeli. Thus, the SAC states sufficient facts to constitute a cause of action for aiding and abetting.[12]

Accordingly, we conclude that the trial court erred by sustaining Williamson's demurrer to the SAC.

B. Contentions Regarding Challman

Fazeli contends that the SAC states causes of action against Challman for negligence and professional negligence. He contends that the trial court erred in ruling that he had failed to state sufficient facts to establish that Challman owed and breached duties of care to him. Fazeli contends that Challman, breached his fiduciary duties to him, because he was the real estate salesperson on loan transactions that directly caused loss to him.[13]

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[12] Fazeli has not challenged the trial court's sustaining of Williamson's demurrer on the fifteenth cause of action for elder abuse. Accordingly, it has been forfeited. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 794-795.)

[13] Prior to the hearing on the demurrers to the SAC, Challman submitted the declaration of his counsel and a portion of Fazeli's deposition testimony in support of his demurrer. Fazeli testified that he never had "business dealings" with Challman and that "Schneider was essentially [his] sole contact with [Cal Plan]." The record does not reflect whether the trial court took judicial notice of the facts disclosed in the deposition. However, "[o]n a demurrer a court's function is limited to testing the legal sufficiency of the complaint. [Citations.] 'A demurrer is simply not the appropriate procedure for determining the truth of disputed facts.' [Citation.]" (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 374.) Taking judicial notice of discovery material in aid of a demurrer also avoids the protections for litigants afforded by the statute authorizing (continued)

Challman acknowledges that Schneider and Cal Plan, as real estate brokers, owed fiduciary duties of the "'highest good faith'" and of the "'"fullest disclosure of all material facts concerning the transaction that might affect the principal's decision."'" (*Barry, supra,* 232 Cal.App.3d at p. 455.) He argues, however, that he was employed by Cal Plan and owed duties only to Cal Plan. We disagree.

In *Montoya v. McLeod* (1985) 176 Cal.App.3d 57, the defendant was a real estate salesperson, who was employed by a real estate broker. (*Id.* at p. 62.) *Montoya* rejected the defendant's characterization of "her duties as that of a mere employee" and her argument that "only her principal, . . . not she, was in a fiduciary relationship with" the plaintiffs. (*Id.* at p.63; see also 2 Miller & Starr, Cal. Real Estate (3d ed. 2011) § 3:25, p. 121 ["A salesperson employed by a real estate broker . . . owes the same fiduciary duties to the agent's principal that are owed by the agent."].) Similarly, here, Challman's representations to Fazeli and his participation in processing loans involving Fazeli created a fiduciary relationship with Fazeli.

Challman's reliance on *California Real Estate Loans, Inc. v. Wallace* (1993) 18 Cal.App.4th 1575 (*Wallace*) is misplaced. In *Wallace*, after a plaintiff had obtained a judgment against a corporate real estate broker, one of its real estate salespersons, and others for fraud and breach of contract, the Department of Real Estate filed accusations against the broker and the salesperson. (*Id.* at p. 1579.) The salesperson stipulated to discipline without a hearing, but the broker took the matter to an administrative hearing, lost, and eventually appealed the order denying its petition for writ of mandate. (*Id.* at pp. 1579-1580.) In reviewing the administrative decision of the Real Estate

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motions for summary judgment and summary adjudication. Code of Civil Procedure, section 437c, subdivision (b) specifically authorizes basing such motions on "affidavits, declarations, admissions, answers to interrogatories, depositions, and matter of which judicial notice shall or may be taken." Accordingly, we will not take judicial notice of Fazeli's deposition testimony.

Commissioner, *Wallace* summarized the underlying case and stated that both the broker and the real estate salesperson had breached their fiduciary duties to the plaintiff. (*Id.* at p. 1581.) Thus, *Wallace* does not support Challman's position that he did not owe a fiduciary duty to Fazeli.[14]

Here, the SAC alleges: Challman told investors that they would receive a promissory note secured by a deed of trust against real property in exchange for their investments, and they would receive interest payments from the borrowers until the principal was paid in full at which time their investment would be returned. Challman told Fazeli, "We will do a good job. I am doing a good job." However, Challman brought monthly checks to Fazeli for interest payments on loans that had already been paid off by the borrowers, thereby assisting Schneider in perpetrating his fraud. Challman was the loan officer for some Fazeli loans and he knew that both Fazeli and Nashban "inconsistently 'held'" the Cheng loan, there was no "recorded secured interest" on the Khasshogi property, Fazeli's interest in the Bear Creek property was not a secured interest, and there was never a recorded interest on the Quereshi loan. Since Challman knew that Fazeli had not received payoff funds to which he was entitled and that not all of Fazeli's loans were secured by real property and he assisted Schneider in his fraudulent conduct, he breached his fiduciary duties to Fazeli. As a result of Challman's breach of duty, Fazeli suffered losses. Accordingly, the SAC stated sufficient facts to constitute causes of action for professional negligence and negligence against Challman.

Fazeli next contends that the SAC stated a cause of action against Challman for aiding and abetting a Ponzi scheme.

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[14] *Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55 has no relevance to the present case. At issue in that case was whether individual supervisory employees were personally liable for discrimination under the Fair Employment and Housing Act when they made a personnel decision. (*Id.* at p. 59.)

"'"Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person . . . gives substantial assistance to the other in accomplishing a tortious result and the person's own conduct, separately considered, constitutes a breach of duty to the third person." [Citations.]' [Citation.]" (*Casey*, *supra*, 127 Cal.App.4th at p. 1144.)

Here, as previously stated, the SAC alleges that Challman gave substantial assistance to Schneider in perpetrating the Ponzi scheme and Challman's own conduct constituted a breach of duty to Fazeli. Thus, the SAC states sufficient facts to constitute a cause of action for aiding and abetting.

Fazeli also argues that the SAC states a cause of action against Challman for elder abuse.

Former Welfare and Institutions Code section 15610.30, subdivision (a)(2) provided: "'Financial abuse' of an elder or dependent adult occurs when a person or entity does any of the following: [¶] . . . [¶] (2) Assists in taking, secreting, appropriating, obtaining or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both." *Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, held that this statute does not impose strict liability for assisting in an act of financial abuse. (*Id.* at p. 744.) Instead, liability is imposed under the same standard for aiding and abetting. (*Id.* at pp. 744-745.) Moreover, this court has held that it creates an independent cause of action. (*Intrieri v. Superior Court* (2004) 117 Cal.App.4th 72, 82.)

The SAC alleges that Fazeli was an elder within the meaning of Welfare and Institutions Code section 15600 on or after August 2000. An elder is defined as "any person . . . 65 years of age or older." (Welf. & Inst. Code, §15610.27.) Since the SAC further alleges that some of Challman's acts in assisting Schneider to retain Fazeli's funds with the intent to defraud Fazeli occurred on or after August 2000, it states sufficient facts to constitute a cause of action for elder abuse.

In sum, the trial court erred when it sustained Challman's demurrer to the SAC.

C. Contentions Regarding Fidelity

Fazeli contends that the SAC sufficiently alleges a cause of action for breach of duty based on contract and that Fidelity breached its duty by giving payoff funds to Cal Plan. Fidelity counters that the SAC fails to sufficiently allege that it made any payments to Schneider or Cal Plan to pay off Fazeli's deeds of trust.[15] Fidelity thus argues that the trial court properly sustained its demurrer to the SAC.

The elements of a breach of contract claim are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." (*Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830 (*Reichert*).)

Here, disregarding the conclusory allegations that the escrow company defendants paid Schneider and Cal Plan rather than Fazeli (*Berg*, *supra*, 178 Cal.App.4th at p. 1034), the SAC alleges that Fidelity handled escrows for two properties: the Baywood property and the Fair Oaks property. In 1994, Fidelity was the escrow company when Fazeli loaned money to the Strobins for the Baywood property and recorded a deed of trust. In July 1995, Old Republic, not Fidelity, executed and recorded a release of all obligations, thereby removing Fazeli's rights under the 1994 deed. The SAC does not specifically allege that Fidelity made any payment to Cal Plan in connection with the Baywood property in either 1994 or 1995. The SAC also identifies Fidelity as the company handling two escrows involving the Fair Oaks property. In June 1996, Fidelity was the

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[15] The trial court did not base its ruling on this ground. However, this court will uphold an order sustaining a demurrer "if there is any ground on which the demurrer can properly be sustained, whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings. [Citation.]" (*Martin*, *supra*, 173 Cal.App.4th at p. 1031.)

escrow company when Fazeli made a loan to Jensen Gardens for the Fair Oaks property and received a deed of trust, which was recorded. In September 1996, Old Republic, not Fidelity, made a payment to Cal Plan in response to a "Beneficiary's Demand for Payoff." In June 2005, Fidelity was also the escrow company when JDN and its co-investors, who had acquired title to the Fair Oaks property in a sheriff's sale six months earlier, sold it to Carson and carried back a deed of trust. However, there is no allegation in the SAC that Fidelity made any payment to Schneider or Cal Plan in its handling of either the 1996 loan escrow or the 2005 sales escrow. Thus, since the SAC fails to sufficiently allege that Fidelity made any unauthorized payments, Fidelity's demurrer to the SAC was properly sustained.

Even assuming that the SAC sufficiently alleges that Fidelity made payments to Cal Plan rather than to Fazeli, it fails to allege that any payments were unauthorized. Fazeli's original complaint, which he verified, as well as the second, fourth, and fifth amended complaints alleged that Cal Plan acted as the loan servicing agent for the investors of the real estate loans made through Schneider or other employees of Cal Plan. The complaint and the second amended complaint further alleged that investors were told that Schneider "would invest their money in mortgage loans secured by real property in exchange for collecting fees as the loan servicer." After Fidelity and Chicago argued on demurrer that Cal Plan was Fazeli's agent, the SAC alleges, without explanation, that Cal Plan acted as the loan servicing agent for "many" of the investors. Given that the SAC contradicts the prior complaints as to whether Cal Plan was the servicing agent for Fazeli, this court may consider the factual allegations made in the prior complaints that Cal Plan acted as the loan servicing agent for investors. (*Berg, supra,* 178 Cal.App.4th at p. 1034.) Since the prior complaints alleged that Fazeli had invested money in real estate loans through Schneider and Cal Plan, these allegations were judicial admissions that Cal Plan acted as the loan servicing agent for Fazeli. (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324; see also 1 Witkin, Cal. Evidence (6th ed. 2012) Hearsay, § 98, p. 922.) "An

agent is one who represents another, called the principal, in dealings with third persons." (Civ. Code, § 2295.) "[P]ayment to the agent is equivalent to payment to the principal. [Citations.]" (*Navrides v. Zurich Ins. Co.* (1971) 5 Cal.3d 698, 706.) Thus, the allegation that Cal Plan acted as the loan servicing agent for Fazeli establishes that any payment by Fidelity to Cal Plan on the deeds of trust that had been executed in favor of Fazeli was the equivalent to payment to Fazeli. Accordingly, Fidelity did not breach any contractual obligation to Fazeli by making any payments to Cal Plan. Moreover, since the causes of action in the SAC against Fidelity for negligence, aiding and abetting a Ponzi scheme, conversion, and elder abuse are predicated on the assumption that Fidelity's payments to Cal Plan were unauthorized, the demurrer was properly sustained as to these causes of action.

Even assuming that Fidelity made payments to Cal Plan that were unauthorized, Fidelity's demurrer to the SAC was properly sustained on other grounds.

Fazeli next contends that Fidelity was "the first party title insurer for [his] assignors," and identifies the assignors as the JDN group and Carson, the parties to the 2005 transaction involving the Fair Oaks property. The SAC alleges that the JDN group assigned to Fazeli "title claims" that it "may have against title companies which issued to them title insurance" for the Fair Oaks property. However, there is no allegation that Fidelity issued a title insurance policy on the Fair Oaks property to JDN, its co-investors, or Carson. There is also no allegation that Fidelity issued any title insurance policy to anyone other than Fazeli on the Baywood property. Thus, the SAC does not contain allegations to support this contention.[16]

[16] Without argument or citation to authority, Fazeli contends that Fidelity was liable for breach of contract as his insurer under title insurance policies. Accordingly, Fazeli has forfeited this issue. (*Cahill*, *supra*, 194 Cal.App.4th at p. 956.)

Fazeli also contends that the SAC sufficiently alleges that Fidelity orally agreed to make payoffs to him when it handled the 1996 escrow in which he made the loan to Jensen Gardens that was secured by a deed of trust. The SAC alleges: "Saeed Fazeli gave oral notification to the escrow companies in connection with other and prior escrow transactions that any payoff of a deed of trust was to be paid to Saeed Fazeli, as compared with anyone else including as compared with Michael Schneider or [Cal Plan]. Saeed Fazeli was in each such instance told by the escrow companies that the normal policy and procedure is to make the payoff to Saeed Fazeli as the beneficiary, not to [Cal Plan]. This included conversations Saeed Fazeli had with escrow officers with, among others, Chicago Title Company, including Kathy C. Fairchild, Fidelity National Title Company, First American Title and American Title, and Old Republic Title Company."

Contract formation requires mutual consent, which cannot exist unless the parties "agree upon the same thing in the same sense." (Civ. Code, §§ 1550, 1565, 1580.) We first note that the SAC does not allege that Fazeli orally notified the escrow companies in connection with the escrow transactions at issue in the present case regarding the payoff of deeds of trust. Though the SAC alleges that the escrow officers stated the companies' "normal policy and procedure," it does not allege that the escrow companies promised to Fazeli to ensure payoff to Fazeli regarding the Baywood and Fair Oaks deeds of trust. Since the SAC does not allege that Fazeli and Fidelity reached an agreement, it does not allege the formation of an oral contract. Accordingly, the trial court properly sustained the demurrer for failure to sufficiently plead the existence of an oral contract.

Fazeli next appears to be arguing that he was a third party beneficiary of instructions from the parties to escrows in which his deeds of trust were to be paid off.

In order to qualify as a third party beneficiary to a contract, a plaintiff must plead and prove that the contract was made for him. (*Martin*, *supra*, 173 Cal.App.4th at p. 1034.) "'"The test in deciding whether a contract inures to the benefit of a third person is whether an intent to so benefit the third person appears from the terms of the

agreement . . . ." [Citation.]' [Citation.] The fact that a third party is incidentally named in the contract, or that the contract, if carried out according to its terms, would inure to his benefit, is not sufficient to entitle him to enforce it. [Citation.] Reading the agreement as a whole in light of the circumstances under which it was made, the terms of the agreement must clearly manifest an intent to make the obligation inure to the benefit of the third party. [Citations.]" (*Ibid.*)

Here, disregarding the allegations made in conclusory terms, the allegations regarding the terms of Fidelity's escrow instructions state that the escrow instructions "included the standard provisions of paragraph 28 of the CAR form California Residential Purchase Agreement and Joint Escrow Instructions" and that Fidelity prepared instructions for payment to Schneider and Cal Plan.[17] First, Fazeli has failed to set forth all the terms of the escrow instructions. Second, though Fazeli attached a copy of paragraph 28 to the SAC, even if we were to consider it in isolation, it does not manifest an intent to benefit him. Thus, the SAC fails to allege facts that any escrow instructions prepared by Fidelity were made for his benefit.

Fazeli further contends that "[t]he damage to [him], and his JDN assignors, was caused by the failure to follow escrow instructions." Thus, he appears to be arguing that he, as an assignee, is entitled to assert breach of contract claims that JDN, its co-investors, and Carson have against Fidelity. There is no merit to this argument. Since an assignee "stands in the shoes of his assignors," Fazeli could have no greater rights than they did. (*Salaman v. Bolt* (1977) 74 Cal.App.3d 907, 919.) To maintain a cause of action for breach of contract, a party must allege and prove damages resulting from the

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[17] Fazeli also alleges in paragraph 162 that Fidelity's general escrow instructions were identical to the Chicago escrow instructions in paragraphs 132, 134, and 136. There are no escrow instructions set forth in those paragraphs.

breach. (*Reichert, supra*, 68 Cal.2d at p. 830.) Here, the SAC fails to allege that any party to a Fidelity escrow sustained damages after Fidelity paid Cal Plan.[18]

Fazeli next contends that the SAC sufficiently alleges a cause of action for negligence. A negligence cause of action requires the plaintiff to "show that [the] defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury. [Citations.]" (*Hayes, supra*, 57 Cal.4th at p. 629.) Fazeli argues that Fidelity breached its duty to him when it "made representations to [him] that were not carried out." However, as previously stated, though the SAC alleges that the escrow officers stated the companies' "normal policy and procedure," it did not allege that they made any promise to Fazeli that they would make the payoffs to Fazeli regarding the Baywood and Fair Oaks deeds of trust.

Fazeli also argues that Fidelity breached it duty to him when it "made payments to Schneider without following its general escrow instructions and without following its standard procedures for beneficiary demands." "'The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion. [Citations.]'" (*Quelimane, supra,* 19 Cal.4th at p. 57.) In *Summit Financial Holdings, Ltd. v. Continental Lawyers Title Co.* (2002) 27 Cal.4th 705 (*Summit*), the parties to a refinance escrow instructed the escrow holder to pay the original holder of the note and deed of trust even though they had been assigned to the plaintiff. (*Id.* at p. 709.) The California

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[18] Fazeli also argues that the SAC states a cause of action for common law trover because Fidelity gave money owed to him to a third party. Fazeli acknowledges that trover is "now known as conversion." "The tort of conversion is derived from the common law action of trover. The gravamen of the tort is the defendant's hostile act of dominion or control over a specific chattel to which the plaintiff has the right of immediate possession. [Citations.]" (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 (*PCO*).) Thus, we will consider his argument in our discussion of the cause of action for conversion.

Supreme Court held that held that the escrow holder, even though it knew of the assignment, owed no duty of care to the beneficiary of the deed of trust who was not a party to the escrow. (*Id.* at pp. 715-716.) Similarly, here, Fidelity owed no duty of care to Fazeli. Thus, the trial court properly sustained the demurrer to the seventh cause of action for negligence.

As to the eighth cause of action for aiding and abetting the commission of breaches of fiduciary duty and fraud, Fazeli argues that Fidelity knew of Schneider's breaches of fiduciary duties and fraud.

"'"Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act . . . ." [Citations.]' [Citation.]" (*Casey, supra,* 127 Cal.App.4th at p. 1144.) Liability will only be imposed when "the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Id.* at p. 1145.)

Here, since the SAC fails to sufficiently allege that Fidelity breached any duty to Fazeli, we consider whether the SAC sufficiently alleges facts to show that Fidelity knew Schneider's conduct constituted a breach of duty and Fidelity gave substantial assistance or encouragement to Schneider to so act. The fraud and breach of fiduciary duty referred to in the SAC is Schneider's retention of payoff funds made to Cal Plan rather than to Fazeli and other investors, and Schneider's concealment of these payoffs. However, the SAC fails to allege that Fidelity had actual knowledge of Schneider's fraudulent conduct when it made any unauthorized payments to Cal Plan. Instead, Fazeli relies on allegations that Fidelity "knew of facts and circumstances that a reasonable escrow agent would perceive as evidence of fraud. This included knowledge of Schneider's representation as real estate broker to [Fazeli] and to persons similarly situated to [Fazeli], the payoffs to the fiduciary Schneider and not the client [Fazeli] or the other investor/lender/victims, the lack of any notice or disclosure by Schneider to [Fazeli] and

similarly situated investor/lenders, and the repeated lack of any Schneider/[Cal Plan] investor/lender signing off the deeds of trust in order to authorize the filing of the deeds of reconveyance." In failing to allege that Fidelity knew Schneider was not remitting the loan payoffs made to Cal Plan to investors or that Schneider was concealing payoffs from investors, the SAC fails to state a cause of action for aiding and abetting a Ponzi scheme.

Fazeli also contends that the SAC sufficiently alleges a cause of action for conversion because Fidelity erroneously delivered the money to the wrong person.

"'A cause of action for conversion requires allegations of plaintiff's ownership or right to possession of property; defendant's wrongful act toward or disposition of the property, interfering with plaintiff's possession; and damage to plaintiff. [Citation.] Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment. [Citation.]' [Citations.]" (*PCO*, *supra*, 150 Cal.App.4th at p. 395.) As previously discussed, the SAC fails to sufficiently allege that Fidelity made any unauthorized payments to Schneider or Cal Plan that were due to Fazeli. Thus, the trial court properly sustained the demurrer to the ninth cause of action for conversion.

Fazeli contends that the SAC states an elder abuse cause of action against Fidelity.

"'Financial abuse' of an elder or dependent adult occurs when a person or entity [¶] . . . [¶] (2) Assists in taking, secreting, appropriating, obtaining or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both." (Former Welf. & Inst. Code, § 15610.30, subd. (a)(2).) As previously discussed, the SAC fails to sufficiently allege that Fidelity committed any wrongful conduct. Moreover, the SAC fails to specifically allege the requisite knowledge in assisting Schneider in his fraudulent conduct. Thus, the SAC fails to allege a cause of action against Fidelity for elder abuse.

Accordingly, the trial court properly sustained Fidelity's demurrer to the SAC.

D. Contentions Regarding Chicago

Fazeli contends that the SAC states a breach of contract cause of action against Chicago. Relying on the language in the deeds of trust identifying him as the beneficiary, Fazeli argues that Chicago wrongfully made payments to Cal Plan to discharge the deeds of trust in connection with the Wainwright and Danville properties. Chicago counters that Cal Plan was Fazeli's agent and thus Cal Plan was authorized to receive these payments.

Here, as previously discussed, the allegation that Cal Plan acted as the loan servicing agent for Fazeli establishes that Chicago's payment to Cal Plan on the Wainwright and Danville deeds of trust that had been executed in favor of Fazeli was the equivalent to payment to Fazeli. (Civ. Code, § 2295.) Accordingly, Chicago did not breach any contractual obligation to Fazeli by making these payments to Cal Plan. Moreover, since the causes of action in the SAC against Chicago for negligence, aiding and abetting a Ponzi scheme, conversion, and elder abuse are predicated on the assumption that Chicago's payments to Cal Plan were unauthorized, the demurrer was properly sustained as to these causes of action.

Assuming that the SAC sufficiently alleges that Cal Plan was not authorized to receive payoff funds, the demurrer to the cause of action for breach of contract was properly sustained on other grounds. Fazeli argues that Chicago issued him a title insurance policy for the Arriaga loan when he made a loan to them in November 2003 that was secured by the Wainwright property. However, the SAC alleges that the Wainwright deed of trust was reconveyed in 2004, and a deed of reconveyance to the Arriagas was executed by Schneider without Fazeli's knowledge. Since the SAC does not allege that Chicago was the escrow company that handled the 2004 transaction, it cannot state a cause of action against Chicago on the theory it breached the title insurance policy by making a payment to Cal Plan.

Fazeli argues that Chicago breached its oral promise that the payoff of a deed of trust would be made to him. Fazeli again relies on the allegation in the SAC that he "gave oral notification to the escrow companies in connection with other and prior escrow transactions that any payoff of a deed of trust was to be paid to" him and he was told that "the normal policy and procedure" would be to make the payoff to him. As we did in connection with Fazeli's arguments regarding Fidelity, we conclude that the SAC fails to allege the formation of an oral contract. (Civ. Code, §§ 1550, 1565, 1580.) Thus, the trial court properly sustained the demurrer for failure to sufficiently plead the existence of an oral contract.[19]

Fazeli next contends that the SAC sufficiently alleges a cause of action for negligence. A negligence cause of action requires the plaintiff to " 'show that [the] defendant had a duty to use due care, that he breached that duty, and that the breach was the proximate or legal cause of the resulting injury.' [Citations.]" (*Hayes*, *supra*, 57 Cal.4th at p. 629.) Fazeli contends that Chicago breached its duty to him when it orally misrepresented to him that any pay off of a deed of trust would be to him as the beneficiary, not to Cal Plan. As previously stated, though the SAC alleges that the escrow officers stated the companies' "normal policy and procedure," it does not allege that they promised to Fazeli to ensure payoff to Fazeli regarding the Wainwright and Danville deeds of trust.

Fazeli also contends that Chicago did not follow its general escrow instructions and its standard procedures for beneficiary demands when it made payments to Schneider. As previously discussed, an escrow holder owes no duty of care to the

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[19] Fazeli also claims that Deming and the Arriagas assigned their rights against Chicago to him for its failure to make payment to them. He asserts that Chicago breached its contractual obligations to them in connection with the escrows in which it paid off Fazeli's deeds of trust by making payments to Cal Plan. However, Fazeli has failed to support this claim with reasoned argument or citations to authority. Accordingly, the issue has been forfeited. (*Cahill*, *supra*, 194 Cal.App.4th at p. 956.)

beneficiary of the deed of trust who was not a party to the escrow. (*Summit, supra*, 27 Cal.4th at p. 709.) Thus, here, Chicago owed no duty of care to Fazeli. Thus, the trial court properly sustained the demurrer to the seventh cause of action for negligence.

Fazeli argues that the SAC stated a cause of action for aiding and abetting a Ponzi scheme.

"'"Liability may . . . be imposed on one who aids and abets the commission of an intentional tort if the person (a) knows the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act . . . ." [Citations.]' [Citation.]" (*Casey, supra*, 127 Cal.App.4th at p. 1144.) Liability will only be imposed when "the defendant had actual knowledge of the specific primary wrong the defendant substantially assisted." (*Id.* at p. 1145.)

We first note that Fazeli's citations to the SAC do not support his claim that "Chicago knew that Schneider was not notifying the lenders/victims, was not paying money over to the lenders, and was treating [Cal Plan] as a sole proprietorship and keeping the money." Most of these citations to the record do not pertain to Chicago at all. As to the relevant allegations, the SAC alleges irregular or improper practices that should have alerted Chicago to suspect that the payoff funds would not be paid to Fazeli, but would be retained by Schneider. The SAC alleges that the escrow companies knew: (1) Schneider made certain representations to Fazeli and those similarly situated; (2) the payoffs were made to Schneider and not to Fazeli; (3) the funds were deposited into Schneider's personal accounts; (4) there was no notice by Schneider to Fazeli and other investors; and (5) the investors did not sign off the deeds in order to authorize the filing of the deeds of reconveyance, thus leading to improper filing of releases of obligation. However, these allegations are insufficient to establish Chicago's actual knowledge of Schneider's breach of duty. Moreover, the SAC fails to allege that Chicago knew these facts when it made a payment to Cal Plan. Thus, the trial court properly sustained the demurrer to the cause of action for aiding and abetting a Ponzi scheme.

Fazeli also contends that he stated a cause of action for conversion.

"'A cause of action for conversion requires allegations of plaintiff's ownership or right to possession of property; defendant's wrongful act toward or disposition of the property, interfering with plaintiff's possession; and damage to plaintiff. [Citation.]" (*PCO, supra,* 150 Cal.App.4th at p. 395.) Here, the SAC alleges that Fazeli was entitled to payment as a beneficiary when the payoffs were made and he suffered damages when he did not receive the payoff funds. However, it also alleges that Chicago made the payments to Fazeli's loan servicing agent. Since Cal Plan, not Chicago, interfered with Fazeli's possession of the payoff funds, the SAC fails to state a cause of action for conversion against Chicago.

Fazeli also contends that the SAC states an elder abuse cause of action against Chicago.

" 'Financial abuse' of an elder or dependent adult occurs when a person or entity [¶] . . . [¶] (2) Assists in taking, secreting, appropriating, obtaining or retaining real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both." (Former Welf. & Inst. Code, § 15610.30, subd. (a)(2).) As previously discussed, the SAC fails to sufficiently allege that Chicago committed any wrongful conduct in connection with the Arriaga or Deming loans. Moreover, the SAC fails to specifically allege the requisite knowledge in assisting Schneider's fraudulent conduct. Thus, the SAC fails to allege a cause of action against Chicago for elder abuse.

In sum, the trial court properly sustained Chicago's demurrer to the SAC.

V. Disposition

The judgment as to Williamson and Challman is reversed. Treating the order sustaining the demurrer as a judgment of dismissal as to Chicago and Fidelity, that judgment is affirmed. Williamson, Challman and Fazeli are to bear their own costs. Costs are awarded to Chicago and Fidelity.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Grover, J.